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No. 09-75

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PETER HOFFMAN, CINEVISIONS, SEVEN ARTS PICTURES INC., SEVEN ARTS FILMED ENTERTAINMENT LIMITED AND SEVEN ARTS PICTURES PLC,

Petitioners / Cross-Respondents,

v.

JONESFILM,

Respondent / Cross-Petitioner.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Was a federal district court within its discretion in confirming a portion of an arbitration award declining to award "net receipts" to a party, despite the party's assertions of misconduct in the arbitration proceedings by another party.

2. Was a federal district court within its discretion in confirming a portion of an arbitration award declining to award "net receipts" to a party, rather than deeming the party's assertions of misconduct in the arbitration proceedings to be binding admissions against interest against the other party.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED FOR REVIEW I

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE CROSS-PETITION 1

A. Respondent's First Question Raises No Issue Fit for This Court's Review 1

B. Respondent's Second Question Raises No Issue Fit for This Court's Review 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Bonar v. Dean Witter Reynolds, Inc.,
835 F.2d 1378 (11th Cir. 1988) 5

Geyer Roofing Inc. v. Roofers Local 30B, United Union of Roofers, Water Proofers and Allied Workers, AFL-CIO,
736 F.Supp. 573 (D.N.J. 1990) 4

Great Am. Ins. Co. v. Horab,
309 F.2d 262 (8th Cir. 1962) 6-7

Office and Professional Employees Intern. Union, Local 2 v. Washington Metropolitan Area Transit Authority,
724 F.2d 133 (D.C. Cir. 1983) 4

Ty Inc. v. Softbelly's Inc.,
353 F.3d 528 (7th Cir. 2003) 5

W.R. Grace & Co. v. Local 759, United Public Workers of America,
461 U.S. 757 (1983) 4

Table of Authorities -- Continued Page(s)

STATE CASES

Longuy v. La Societe Francaise De Bienfaisance Mutuelle,
52 Cal.App. 370 (1921) 6

McCool v. Gehret,
657 A.2d 269 (Del. 1995) 6

FEDERAL STATUTES

Fed. R. Civ. P. 60(b)(3) 5
Fed. R. Civ. P. 60(c) 5

STATEMENT OF THE CASE

Petitioners/Cross-Respondents Peter Hoffman, Cinevisions, Seven Arts Pictures Inc., Seven Arts Filmed Entertainment Limited and Seven Arts Pictures PLC (collectively, "Petitioners") dispute Respondent/Cross-Petitioner Jonesfilm's ("Jonesfilm" or "Respondent") Statement of the Case and Petitioners incorporate by reference Petitioners/Cross-Respondents' Statement of the Case set forth in their original Petition for Certiorari as though fully set forth herein.

REASONS FOR DENYING THE CROSS-PETITION

Respondent Jonesfilm has not identified any legal issue fit for this Court's review. Jonesfilm has not identified any important legal issue that this Court has not yet addressed. It has not identified any legal issue on which the Circuit Courts of Appeals are divided. One is hard pressed to even identify a discernable legal issue for review at all in the Cross-Petition. At bottom, Jonesfilm's Cross-Petition is little more than a thinly-veiled attempt to prejudice the Court against Petitioners by repeatedly raising unsubstantiated allegations of misconduct during the arbitration proceedings by one of the Petitioners. Such use of a Cross-Petition is improper and the Cross-Petition should be denied.

A. Respondent's First Question Raises No Issue Fit for This Court's Review

Respondent Jonesfilm repeatedly alleges that the arbitration proceeding was "permeated" with "coercion," "threats," and "intimidation." On this

basis alone, Jonesfilm urges that the only portion of the arbitrator's award in favor of Petitioners – *viz.*, the denial of Jonesfilm's request for an award of "net receipts" – should have been reversed by the District Court.[1]

As a factual matter, neither the arbitrator in the Second Arbitration nor the District Court made any such finding. The District Court rejected Jonesfilm's arguments regarding procurement of this portion of the arbitral award through "undue means." *See* App. 38-40a. Jonesfilm cited two grounds for its assertions of undue means: (i) "refus[ing] to provide [] subpoenaed discovery" and (ii) "threatening to file costly civil litigation . . . ." App. 39-40a. With respect to (i), as stated in Petitioners' Petition, Petitioners objected to arbitral jurisdiction, and thus did not participate in the arbitration proceedings except to file objections to jurisdiction. As the District Court pointed out, however, the arbitrator "held hearings" to determine all facts relevant to the arbitration award. App. 39a. The arbitrator "was satisfied the information adduced at the hearing allowed him to calculate Net Receipts," and the arbitrator "reviewed and rejected [Jonesfilm's] arguments" regarding "undue means." *Id.* The District Court agreed with the arbitrator and "decline[d] to give [Jonesfilm] a 'second bite at the apple.'" *Id.* With respect to (ii), the District Court noted that Jonesfilm "*contends* that the Net Receipts portion of the Final Award was improperly procured by other 'undue means' – *i.e.*,

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[1] Jonesfilm's repeated statements that these allegations are "undisputed" and that Petitioners have "never disputed" these allegations (*see, e.g.*, Cross-Petition at 3-4) are patently false.

intimidation and coercion." App. 40a (emphasis added). The District Court then properly rejected Jonesfilm's unsubstantiated allegations that threats of lawsuits against the arbitrator somehow resulted in the arbitrator's favoring of Petitioners. *Id.* The District Court pointed out that the arbitrator ruled against Petitioners on practically every issue in the arbitration and even awarded Jonesfilm "its hotly contested fees." *Id.* It thus strains credibility to suggest that even if such threats and coercion had been found – which they had not – that such conduct would have affected only the Net Receipts award. "[Jonesfilm] cannot have it both ways." *Id.* In short, the District Court never endorsed Jonesfilm's allegations or made findings of "threats and coercion" by Petitioners, as Jonesfilm wrongly states.

While the Ninth Circuit opinion makes one passing statement that appears to endorse the Jonesfilm view that threats were made by one of the Petitioners, *see* App 5a, it immediately went on to cast doubt on such a reading of that statement, saying that "*even if Jonesfilm could show . . .*" that the alleged threats and intimidation had occurred, it would not be entitled to relief on that basis. App. 6a. Indeed, the Court of Appeals quickly dispatched Jonesfilm's arguments predicated on such threats. The Court of Appeals stated that even if such misconduct had occurred, "all parties, including the arbitrator, were aware of those threats prior to that proceeding." App. 5a. It then held, citing its own binding precedent, that a party may not get a "second bite at the apple" by asserting "undue means" where the alleged undue means were apparent in the arbitration proceeding. App. 6a. In short, the Ninth Circuit rejected Jonesfilm's arguments and it is far

from clear that the Ninth Circuit intended in any way to endorse the factual predicate of those arguments.

Regarding the legal effect of a finding of coercion (which was not made here), Jonesfilm cites only three cases addressing the effect of coercion on an arbitration award, none of which provides any basis for vacating an award under the circumstances here presented. The first case, *Office and Professional Employees Intern. Union, Local 2 v. Washington Metropolitan Area Transit Authority*, 724 F.2d 133 (D.C. Cir. 1983), involved allegations of misconduct, partiality and bias *by an arbitrator* that are wholly unlike the allegations in this case. *Id.* at 140. While the D.C. Circuit stated the general proposition that "an arbitral award will not be enforced if it was procured by fraud or coercion," *id.*, it rejected the claim that the award should be vacated for fraud or coercion under the circumstances there presented.[2] Similarly, *Geyer Roofing Inc. v. Roofers Local 30B, United Union of Roofers, Water Proofers and Allied Workers, AFL-CIO*, 736 F.Supp. 573 (D.N.J. 1990), is inapposite. There the court found that the victim had been coerced into entering into the arbitration agreement in the first place, and that the arbitration proceedings were blatantly stacked in favor of the union. *Id.* at 578. Indeed, the court found that the union had "informed Geyer of the [arbitration] board's decision before the arbitration took place." *Id.* Jonesfilm has alleged no remotely comparable

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[2] As the D.C. Circuit pointed out, this principle is a "corollary" of the principle articulated by this Court in *W.R. Grace & Co. v. Local 759, United Public Workers of America*, 461 U.S. 757, 766 (1983), that arbitration awards that are contrary to well-defined public policy will not be upheld.

misdeeds. *See also Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 n.8 & n.9 (11th Cir. 1988) (vacating portion of award only after finding that a material witness had perjured himself).

Jonesfilm also cites cases decided under Rule 60(b)(3) as authority for ordering relief from an arbitral award based on "fraud . . . , misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). Even assuming that 60(b)(3) is applicable to arbitral awards (which is far from clear), that Rule is inapplicable here because Jonesfilm never requested relief under Rule 60(b)(3). As a result, *Ty Inc. v. Softbelly's Inc.*, 353 F.3d 528, 537 (7th Cir. 2003), and the other 60(b)(3) cases cited by Jonesfilm are inapposite. Moreover, the time for invoking that 60(b)(3) has expired. Fed. R. Civ. P. 60(c) (stating that a motion under Rule 60(b)(3) "must" be made "no more than a year after the entry of the judgment. . . ."); *cf.* App. 21a (June 20, 2007 order confirming the arbitration awards).

B. Respondent's Second Question Raises No Issue Fit for This Court's Review

Jonesfilm's second question differs little from its first question, and it suffers from the defects detailed above. In addition, the second question attempts to fold in the evidentiary issue of whether Jonesfilm's allegations of misconduct should not merely have been considered and weighed – as the courts below clearly did – but should have been deemed a binding admission against interest as to the Petitioners. Indeed, Jonesfilm's arguments go further to suggest that a court faced with allegations of undue influence over a witness must simply direct a ruling against the party against whom the allegations are made as a

matter of law. Such a rule has no basis in law or logic.

As an initial matter, as detailed above, there has been no finding of misconduct here by the arbitrator or by any court. As a result, a fundamental premise of Jonesfilm's argument is lacking and its argument cannot stand.[3]

Jonesfilm's cases simply do not support its position here. Indeed, none of Jonesfilm's cases even supports the lesser contention that allegations of undue influence over a witness should operate as an admission against interest. The cases cited by Jonesfilm merely recite the uncontroversial proposition that evidence of undue influence over a witness is admissible against that party, and that a court or jury is free to draw appropriate conclusions from that evidence. *See Longuy v. La Societe Francaise De Bienfaisance Mutuelle*, 52 Cal.App. 370, 376 (1921) (stating only that the lower court "should have at least permitted the further offer of proof" as to allegations of undue influence of a witness); *McCool v. Gehret*, 657 A.2d 269, 277 (Del. 1995) (holding merely that evidence of undue influence of a witness was admissible to show that "Dr. Gehret considered his case to be weak"). As the Court of Appeals in the principal case cited by Jonesfilm held, while evidence of undue influence may be "an indication of the litigant's consciousness that his case is weak or unfounded or that his claim is false or fraudulent," courts and triers of fact are free to draw their own conclusions about such evidence. *Great*

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[3] Moreover, even assuming *arguendo* that there were some finding of misconduct by Petitioners, Jonesfilm waived this argument by failing to raise it below. *See* App. 3-6a.

Am. Ins. Co. v. Horab, 309 F.2d 262, 265 (8th Cir. 1962). Indeed, the court emphasized, "the exclusion of the evidence in question in this civil case did not constitute or equate with a denial of substantial justice, [and] its admission or exclusion fell within the area of judicial discretion, and [] there was no abuse of that discretion here." *Id.* Thus, none of Jonesfilm's cases stands for, or even suggests, the extraordinary proposition that a party's allegations of undue influence over a witness require a court to direct a ruling against the party against whom the allegations are made as a matter of law. Such a rule simply makes no sense.

Jonesfilm's request for an admission against interest to be directed as a matter of law is particularly facile given the actual alleged misconduct at issue here. Indeed, the principal conduct on which Jonesfilm's allegations of undue influence of witnesses was based occurred *9 1/2 years prior to the arbitration*. Respondent's claim that a witness' cost estimate at the arbitration was "coerced" by conduct that occurred 9 1/2 years prior to the arbitration is baseless.[4]

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[4] The arbitrator's decision rejecting Respondent's Picture Revenue Claim was based on a final cost estimate delivered by Steven Ransohoff, the principal executive of Film Finances, Inc., the completion guarantor of the First Sequel, on May 5, 1997. This final cost estimate was required as a delivery item under the terms of the distribution agreement between Petitioner Cinevisions and Trimark Pictures Inc. ("Trimark"), the domestic distributor of the First Sequel, guaranteed by Film Finances to the production financier to ensure full payment of Trimark's distribution guarantee. Respondent apparently claims that Petitioners "coerced" and "threatened" Ransohoff to deliver this final cost estimate in May 1997 when Petitioners threatened to sue Film Finances if it did not receive the full distribution

Jonesfilm's second question presents no legal issue fit for this Court's review.

CONCLUSION

Petitioner/Cross-Respondents respectfully request that this Court deny the Cross-Petition for the reasons set forth herein.

Respectfully submitted,

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guarantee from Trimark by reason of Ransohoff's failure to deliver the required final cost estimate, as he was legally required to do. But the alleged "coercion" of Ransohoff (to comply with Film Finances' contractual obligation) occurred in May 1997 – more than 9 1/2 years before Ransohoff's testimony in the Second Arbitration, which testimony freely confirmed his certification of the final estimated cost of the First Sequel, as set forth in his certificate of 9 1/2 years previous. As is clear from the Cross-Petition, this is the factual basis of Jonesfilm's claim of "coercion" or "intimidation," not the equally suspect claim by Jonesfilm of a similar threat of litigation by Petitioners against another witness at the time of the Second Arbitration (which the Court of Appeals appears to have mistakenly believe to be the basis for Respondent's argument).